No. 91-1916

Supreme Court, U.S.
FILED
JUN 1 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WESTERN SHOSHONE NATIONAL COUNCIL, in its own behalf and in behalf of Western Shoshone Tribal Governments; IAN ZABARTE; FELIX IKE,
Petitioners,

v.

WILLIAM MOLINI, Director, Nevada Department of Wildlife; TERRY CRAWFORTH, Director of Law Enforcement, Nevada Department of Wildlife,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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61

QUESTION PRESENTED

In 1863 the United States and the Western Shoshone Indians entered a treaty of "Peace and Friendship," the Treaty of Ruby Valley. Under the Treaty the United States acquired certain rights and interests in Western Shoshone land located within what is now the State of Nevada. Asserting that the Treaty reserved pre-existing aboriginal hunting and fishing rights, the Western Shoshone have continued customary hunting and fishing practices throughout their ancestral lands. In 1979, the United States Court of Claims certified a monetary award by the Indian Claims Commission to Western Shoshones for the taking of Western Shoshone aboriginal land title by a pattern of "gradual encroachment." Western Shoshone claims to hunting and fishing rights were not specifically addressed in the Commission's proceedings and award.

The question presented is whether the Indian Claims Commission award for the taking of Western Shoshone title extinguishes Western Shoshone hunting and fishing rights or bars the Western Shoshone from asserting hunting and fishing rights against State of Nevada wildlife officials.

PARTIES BELOW

Parties to the proceedings below not listed in the caption are Roland Brady and Glenn Holley, appellants in the Court of Appeals for the Ninth Circuit. Mr. Brady and Mr. Holley are both recently deceased.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES BELOW	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	9
I. THE ISSUES RAISED IN THIS CASE ARE OF GREAT SIGNIFICANCE	9
II. THE COURT OF APPEALS PROPOUNDS A NEW FRAMEWORK OF TREATY INTERPRETATION REPUDIATING OVER A CENTURY OF FEDERAL INDIAN LAW	13
III. THE COURT OF APPEALS DISREGARDED GENERAL FEDERAL PRECLUSION DOCTRINE AND THE PLAIN LANGUAGE OF THE STATUTORY BAR OF THE INDIAN CLAIMS COMMISSION ACT, FORGING AN UNDULY ONEROUS RULE OF PRECLUSION WHERE INDIAN CLAIMS PROCEEDINGS ARE IMPLICATED	17
IV. THE COURT OF APPEALS DECISION FORGES A NEW DOCTRINE OF EXTINGUISHMENT OF INDIAN RIGHTS IN CONFLICT WITH FOUNDATIONAL PRINCIPLES LONG UPHELD BY THIS COURT	24
CONCLUSION	27

APPENDICES

A. Opinion of the United States Court of Appeals for the Ninth Circuit 1a

B. Judgment of the United States District Court for the District of Nevada 10a

C. Order denying petition for rehearing 16a

D. Treaty between the United States of America and the Western Bands of Shoshonee Indians (Treaty of Ruby Valley) 17a

E. Letter to Mr. Clarence Blossom from Attorney Robert Barker of Jan. 13, 1960 ..... 22a

TABLE OF AUTHORITIES

Cases:	Page
SUPREME COURT CASES:	
Antoine v. Washington, 420 U.S. 194 (1975)	19
Choctaw Nation v. United States, 318 U.S. 423 (1943)	13
Blonder-Tongue Labs. v. Univ. Foundation, 402 U.S. 313 (1971)	23
Jones v. Meehan, 175 U.S. 1 (1889)	13
Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335 (1945)	16
Nevada v. United States, 463 U.S. 143 (1983)	22
Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985)	13,26
Triplett v. Lovell, 297 U.S. 638 (1936)	22
United States v. Dann, 470 U.S. 39 (1985)	8,9,11,22,24
United States ex. rel. Hualpai Indians v. Santa Fe Pacific Railroad, 314 U.S. 339 (1941)	25
United States v. Winans, 198 U.S. 371 (1905)	15
OTHER CASES:	
Beard v. O'Neal, 728 F.2d 894 (7th Cir.) *cert. denied*, 469 U.S. 825 (1984)	22
Cayuga Indian Nation v. Cuomo, 667 F. Supp. 938 (N.D.N.Y. 1987)	11
Carpenter v. United States, 108 F. Supp. 107 (Ct. Cl. 1952)	17
Davis Wright & Jones v. National Union Fire Ins., 709 F.Supp. 196 (W.D. Wash. 1989)	22
Devils Lake Sioux Tribe v. North Dakota, 917 F.2d 1049 (8th Cir. 1990)	20,25
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Table of Authorities Continued

Page

Havasupai Tribe v. United States, 752 F. Supp. 1471 (D. Ariz. 1990), *aff'd*, 943 F.2d 32 (9th Cir. 1991) 21

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Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455 (10th Cir. 1987) 20

Shoshone Nation or Tribe of Indians v. United States, 11 Ind. Cl. Comm. 387 (1962) 6,25

Swim v. Bergland, 696 F.2d 712 (9th Cir. 1983) .. 20

Temoak Band of Western Shoshone Indians v. United States, 593 F.2d 994 (Ct. Cl.), *cert. denied*, 444 U.S. 973 (1979) 8

United States v. Dann, 873 F.2d 1189 (9th Cir.), *cert. denied*, 110 S.Ct. 234 (1989) 20

United States v. Dann, 706 F.2d 918 (9th Cir. 1983), *rev'd on other grounds*, 470 U.S. 39 (1985) 4,9,18,25

United States v. Dann, 527 F.2d 222 (9th Cir. 1978) 7

United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd in relevant part*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1988) 15

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Table of Authorities Continued

Page

Western Shoshone Identifiable Group v. United States, 29 Ind. Cl. Comm. 5 (1972) 20

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STATUTES:

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MISCELLANEOUS:

S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 (No. 2) Ariz. J. Int'l & Comp. L. (forthcoming Spring 1992) 12

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Page

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Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 Yale J. Int'l L. 127 (1991) 12

Charles F. Wilkinson, Indians, Time and the Law (1987) 12

Robert Williams, Jr. *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 Duke L. J. 660 12

Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction (1981) 22

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Petitioners,

v.

WILLIAM MOLINI, Director, Nevada Department of Wildlife; TERRY CRAWFORTH, Director of Law Enforcement, Nevada Department of Wildlife,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, the Western Shoshone National Council and individual Western Shoshones, request that a writ of certiorari issue to review the judgment and opinion entered by the United States Court of Appeals for the Ninth Circuit in this case on December 9, 1991.

OPINIONS BELOW

The opinion of the court of appeals is reported at 951 F.2d 200 (9th Cir. 1991) and is reprinted in the Appendix (App. A, *infra*, 1a). The judgment and opinion of the United States District Court for the District

of Nevada is not reported, but it is also reproduced in the Appendix (App. B, *infra*, 10a).

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1991 (App. A *infra*, 1a). A timely petition for rehearing was denied on March 2, 1992 (App. C. *infra*, 16a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATY AND STATUTE INVOLVED

1. The Treaty of Ruby Valley, 18 Stat. 689 (1869), is set forth in full in the Appendix (App. D, *infra*, 17a).

2. Section 22 of the Indian Claims Commission Act, ch. 959, 60 Stat. 1055, 25 U.S.C. (1976 ed.) 70u provides:

> (a) . . . The payment of any claim, after its determination in accordance with this [Act], shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.
> (b) A final determination against a claimant made and reported in accordance with this [Act] shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

STATEMENT

In this action the court of appeals affirmed a grant of summary judgment, holding that the Western Shoshone could not assert aboriginal or treaty-reserved hunting and fishing rights against the State

of Nevada Department of Wildlife. The court relied upon a 1979 award by the Indian Claims Commission (sometimes hereinafter the "ICC") which was premised upon a finding that Western Shoshone title to ancestral lands had been extinguished. The court held that the Commission award conclusively establishes that Western Shoshone aboriginal title is extinguished. The court further held that there is no treaty provision which expressly "grants" hunting or fishing rights to the Western Shoshone and that, in the absence of such an express provision, the extinguishment of title necessarily entails an extinguishment of hunting and fishing rights. In its decision the court did not address arguments of *reserved* or *implied* treaty hunting and fishing rights, arguments urging a fair reading of treaty language in light of unrefuted evidence of historical circumstances and the understanding of the parties to the treaty.

The Western Shoshone National Council is an organization comprised of Western Shoshone leaders including representatives of federally recognized Western Shoshone tribal governments. In 1986 the National Council and individual Western Shoshones commenced this action in the United States District Court for the District of Nevada to enjoin certain application of Nevada wildlife laws and regulations. In their complaint the Western Shoshone alleged that the State's imposition of its generally applicable wildlife laws to Western Shoshones hunting or fishing within their aboriginal use area violates their rights as secured by the federal common law doctrine recognizing the sovereignty and aboriginal rights of Indian tribes and their members, and as secured by the Treaty of Ruby Valley, 18 Stat. 689 (1869) (App. D,

infra, 17a), a treaty of "Peace and Friendship" between the United States and the Western Shoshone.

The Treaty of Ruby Valley was one of five treaties that U.S. Indian Commissioner James Doty negotiated with the various bands of Shoshone Indians in 1863. Omer C. Stewart, *The Shoshone Claims Cases* in Irredeemable America: The Indians' Estate and Land Claims 187, 195 (Sutton Ed. 1985). In 1862 Congress appropriated funds to negotiate the peace treaties with the Shoshone, with the understanding that the treaties would secure non-Indian interests while not extinguishing Shoshone use and occupancy rights to their lands. *See* Cong. Globe, 37th Congress, 2nd Sess. 2092, 2119-21 (1862).

While allowing for certain non-Indian uses of Western Shoshone lands under articles 2, 3, and 4, the Treaty of Ruby Valley left the Indians otherwise undisturbed until required by the President to be removed to a reservation. Article 5 of the Treaty defined "the boundaries of the country claimed and occupied by" the Western Shoshone. Article 6 stipulated that they would "abandon the roaming life, which they now lead," when in the future the President might deem it desirable to establish a reservation for them within "the country above described" where they could then live as "herdsmen and agriculturalists."

No reservation complying with article 6 of the Treaty was ever established, *United States v. Dann*, 706 F.2d 919, 930 (9th Cir. 1983), *rev'd on other grounds.*, 470 U.S. 39 (1983). The Western Shoshone consistently have maintained that, at least in the absence of such a reservation, the Treaty preserves their rights to occupy and live off the fruits of their ab-

original territory, and specifically to hunt and fish. Steven J. Crum, *The Western Shoshone People and their Attachment to the Land: A Twentieth Century Perspective*, 2 Nev. Pub. Affairs Rev. 15 (1987) (appended to Plaintiff's Reply Memorandum on Summary Judgment Motion, docket no. 52 of record below). Accordingly, the Western Shoshone from the time of the Treaty through the present have continued to hunt and fish pursuant to customary practices and beliefs, and without regard to Nevada wildlife laws and regulations, throughout the lands described in the Treaty. *Id*; Declarations of Zabarte, Brady, Holley and Ike (exhibits to Plaintiffs Memorandum in Opposition to Motion to Dismiss, docket no. 13 of record below).

After the Western Shoshone initiated this action to confirm aboriginal and treaty-reserved rights to hunt and fish, they moved alternatively for summary judgment and preliminary injunction. The parties negotiated a stipulation for a preliminary injunction, which the district court ordered into effect on January 4, 1988. Under the agreed-upon preliminary injunction, the State of Nevada refrained from enforcing its wildlife laws upon Western Shoshone hunting and fishing, except in respect to certain species of animals considered vulnerable to harvesting. The preliminary injunction order entrusted the Plaintiff Western Shoshone National Council with certain regulatory functions, including reporting to the Defendants on big game taken by Western Shoshones. The parties cooperated amicably under the terms of the injunction.

On the merits of the claim the State of Nevada argued that Western Shoshone hunting and fishing rights were extinguished as a result of the 1979 judg-

ment and award in *Western Shoshone Identifiable Group v. United State*, Docket 326-K before the Indian Claims Commission. The district court agreed and granted summary judgment in favor of the State, and the court of appeals affirmed. In the proceedings below it was never contended or found that the federal government has caused, by some means independent of the Indian Claims Commission, an extinguishment of Western Shoshone rights.

The award in Docket 326-K, upon which the district court and court of appeals decisions rest, is the culmination of a claim brought before the Indian Claims Commission in 1951 by the Temoak Band Council on behalf of the "Western Shoshone Identifiable Group", which presumably included all the Western Shoshone. The Temoak Band, one of several Western Shoshone tribal entities, filed the claim pursuant to the Indian Claims Commission Act, Ch. 959, 60 Stat. 1049 (1946), codified as amended at 25 U.S.C. §§ 70-70v (1976 ed. and 1980 Supp.) (sometimes hereinafter "ICCA"), which granted the Commission jurisdiction to render damage awards against the United States for the taking of Indian lands, among other wrongs. Its jurisdiction encompassed claims arising on or before August 13, 1946. *Id.*

The Commission found that the Western Shoshone had "exclusively used and occupied" a specified area encompassing roughly 22 million acres prior to the arrival of non-Indians and thus had held title to that area. *Shoshone Nation or Tribe of Indians v. United States*, 11 Ind. Cl. Comm. 387, 412 (1962). Upon that finding the Commission summarily concluded that the "title" to the entire area had been extinguished when the Indians were deprived of the lands by "gradual

encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States for its own use and benefit, or the use and benefit of its citizens." *Id.* at 416, 446-b.

The proposition that the Western Shoshone had lost title to all their lands by acts of encroachment and unspecified federal takings was encouraged and stipulated by the Temoak Band's attorneys. Accordingly, Western Shoshone claims of surviving or existing rights were neither presented nor adjudicated in the Commission proceedings. *United States v. Dann*, 527 F.2d 222, 226 (9th Cir. 1978). (At the conclusion of the proceedings, the attorneys for the Temoak Band successfully petitioned for attorneys' fees of ten percent of the $26 million award, the maximum attorneys' fee allowed by statute, 25 U.S.C. 70n (1976 ed.)).

Although the ICC allowed the Temoak Band to pursue the claim on behalf of all the Western Shoshone, the Temoak Council was (and continues to be) only one of the several governing bodies of the various Western Shoshone tribal entities. *See* E. Rusco, *The Organization of the Te-Moak Bands of Western Shoshone*, XXV Nevada Hist. Soc. Q. 175, 176 (1982). In 1974, while the claim was still pending, a group of Western Shoshone, including Chief Frank Temoke of the Western Shoshone Traditional Council, attempted to intervene in the proceedings and remove from the claim certain lands they contended had never been taken. The intervenors also alleged fraud and collusion in the handling of the claim.

The Commission rejected the intervention, and the Court of Claims affirmed, viewing the dispute an internal one among the Western Shoshone over liti-

gation strategy. *Western Shoshone Legal Defense and Educ. Ass'n v. United States*, 531 F.2d 495 (Ct. Cl.), *cert. denied*, 429 U.S. 885 (1976). In 1976 the Temoak Band Council itself moved for a stay of the claims proceedings in order to seek an administrative declaration that the Western Shoshone still held title to over half the lands the Commission had found taken. The Commission denied the motion to stay the proceedings, and the Court of Claims again affirmed, primarily on the ground that the motion for the stay had been untimely. *Temoak Band of Western Shoshone Indians v. United States*, 593 F.2d 994 (Ct. Cl.), *cert. denied*, 444 U.S. 973 (1979). Thus the Commission entered a final award of approximately $26 million over the objections of the very Indian petitioners before it, and on December 6, 1979 the clerk of the Court of Claims certified the award to the General Accounting Office.

Subsequently, in *United States v. Dann*, 470 U.S. 39 (1985), this Court held that, even though the funds remained undistributed to the Western Shoshone, "payment" of the claim had occurred within the meaning of Section 22(a) of the Indian Claims Commission Act. Under Section 22(a), "payment of any claim" acts as a "full discharge of the United States" of further claims "touching any of the matters involved in the controversy". 25 U.S.C. 70u (1976 ed.).[1]

[1] The *Dann* litigation involved a trespass action against Western Shoshones Mary and Carrie Dann for grazing cattle without a federal permit on lands designated as federal public domain and subject to the Taylor Grazing Act. The Ninth Circuit held that a mere credit to a Treasury account for the ICC award did not constitute "payment" of the award so as to preclude the Dann's defense under the statutory discharge and bar of

Congress has yet to enact a distribution plan for the award moneys.

REASONS FOR GRANTING THE PETITION

I. THE ISSUES RAISED IN THIS CASE ARE OF GREAT SIGNIFICANCE.

The court of appeals decision in this case assaults basic doctrines long upheld by this Court in areas of utmost importance to the country's definition of its legal and moral posture toward Native American communities. Subsequent parts of this Petition will demonstrate the following: First, the Ninth Circuit upended canons of treaty interpretation, casting away the normal judicial sensitivities to the understanding of Indian treaty parties. Secondly, the court has promoted Indian claims awards as having a broader preclusive effect than that generally accorded judgments, divesting Indians of guarantees of fairness in the adjudicative process. Thirdly, by holding that the Indian Claims Commission award for the taking of Western Shoshone title resulted in the extinguishment of Western Shoshone hunting and fishing rights, the court

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the ICCA. *United States v. Dann*, 706 F.2d 919, 925-26 (9th Cir. 1983). The court further concluded that aboriginal title to the subject lands had not actually been extinguished, rejecting theories of extinguishment based on application of the public land laws, including the homestead laws and the Taylor Grazing Act. *Id.* at 928-33. On *certiorari*, this Court reversed the Ninth Circuit decision, but only on the ground that "payment" within the meaning of the statutory bar had occurred. *Dann*, 470 U.S. at 45. Subsequently, the Ninth Circuit found the Dann sisters precluded from asserting Western Shoshone aboriginal title against the United States in its trespass action as a result of the statutory bar. *United States v. Dann*, 873 F.2d 1189 (9th Cir.) *cert. denied*, 110 S. Ct. 234 (1989).

propounded a new low point in the legal threshold for finding Indian rights extinguished.

The court of appeals decision signifies the denial of access to wildlife resources and customary practices crucial to the material well-being and cultural dignity of the Western Shoshone people. Many Western Shoshones depend on subsistence hunting and fishing practices as an important source of food; and such customary practices are of deep spiritual significance, constituting an important element in the survival of Western Shoshone cultural life. *See* Declarations of Holley, Zabarte, Ike and Brady, *supra*, docket no. 13 of record below); Declaration of Saggie Williams (exhibit to Plaintiffs' Motion for Summary Judgment, docket no. 35 of record below); *see also* Omer C. Stewart, *The Western Shoshone of Nevada and the U.S. Government 1863-1950* in Selected Papers From the 14th Great Basin Anthropological Conference 77, 80, 81 (Touhy ed. 1974) (discussing the "strong attachment" of Western Shoshones to their traditional way of life and concluding that "strong and often repeated attempts to wean Western Shoshone away from their own natal valleys have failed").

The Ninth Circuit's interpretation of the Treaty of Ruby Valley, an interpretation that denies hunting and fishing rights, renders a mockery of the "Peace and Friendship" to which the Treaty negotiators aspired and the United States promised. If allowed to stand, the court of appeals' abandonment of the traditional method of treaty interpretation will most assuredly bring into question the vitality of other treaties among the many that substantially define the rights of Native Americans.

The court of appeals' assessment of the effect of an Indian Claims Commission award also has far-reaching implications. During its lifetime, the Indian Claims Commission adjudicated approximately 375 claims affecting most Indian communities in the United States. Robert N. Clinton, Nell J. Newton & Monroe E. Price, American Indian Law 722 (3d. ed. 1991). Many ongoing or potential controversies concerning the existing rights of Indian tribes stand in the shadow of ICC awards. See, for example, ongoing litigation concerning the Cayuga claim for possessory rights in tract of land in New York, *Cayuga Indian Nation v. Cuomo*, 667 F. Supp. 938 (N.D.N.Y. 1987). The Ninth Circuit holding, under which Indian Claims Commission awards would have a sweeping impact on Indian rights, is at odds with the way federal courts in other circuits have treated ICC awards (see *infra*, 20-22), including the court in *Cayuga Nation*, which held a Commission award not to have any preclusive effect in favor of parties other than the United States. 667 F. Supp. at 947 & n. 12.

In *United States v. Dann*, 470 U.S. 39 (1985), this Court instructed that the statutory bar of the Indian Claims Commission act is effective upon certification of an ICC award. The Court, however, did not sanction the Ninth Circuit's aberrational interpretation of the *consequences* of the statutory bar, an interpretation that defies generally accepted preclusion principles and would uniquely disadvantage Native Americans in assessments of the effects of past judgments.

The importance of the issues in this case is heightened by the obligations of the United States on the international plane and by the role of the nation as

a model for the protection of human rights. The international community, through the United Nations system and regional intergovernmental bodies, has become increasingly concerned to ensure the just treatment of indigenous peoples, including Native Americans. *See* Robert Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 Duke L. J. 660; Hurst Hannum, *New Developments in Indigenous Rights*, 28 Va. J. Int'l L. 649 (1988); S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, 1989 Harvard Indian Law Symposium 191 (reprinted in Clinton, *et al.*, *supra*, at 1257); Russel Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 Am. J. Int'l L. 369 (1980). International norms have emerged upholding indigenous peoples' rights to enjoy the natural resources that traditionally have sustained them and, moreover, to retain their cultural integrity. S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 (No. 2) Ariz. J. Int'l & Comp. L. (forthcoming Spring 1992); Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 Yale J. Int'l L. 127, 158-60 (1991); Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 Okla. City U. L. Rev. 667, 690, 698-99 (1990). United States law toward its native people has been called "one of the most progressive of any nation," embodying doctrines that "can be rallying cries" in other parts of the world. Charles F. Wilkinson, Indians, Time and the Law 5 (1987). The court of appeals decision in this case threatens to tarnish

that image by undermining fundamental doctrines, as discussed subsequently.

II. THE COURT OF APPEALS PROPOUNDS A NEW FRAMEWORK OF TREATY INTERPRETATION REPUDIATING OVER A CENTURY OF FEDERAL INDIAN LAW.

The court of appeals decision rests on the premise that the Western Shoshone hunting and fishing rights never were confirmed by treaty and that, as a consequence, the rights cannot survive in the absence of full occupancy rights to aboriginal lands. The court arrives at this conclusion by promoting a novel rule of treaty interpretation contrary to long-standing canons of construction. This Court and the lower federal courts have for over a hundred years adhered to the doctrine that Indian treaty interpretation must be guided, not by legalistic or technical readings, but by an assessment of the understanding of the Indian parties, with all possible inferences in their favor. *Jones v. Meehan*, 175 U.S. 1, 11 (1889); *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Oregon Dept. of Fish and Wildlife v. Klamath*, 473 U.S. 753, 774 (1985); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 356 (7th Cir. 1983). This doctrine of construction is grounded in an awareness and concern about the uneven bargaining power and lack of English language skills of Indians when the United States treated with them. *Jones v. Meehan*, 175 U.S. at 10-11.

Under the express terms of the Treaty of Ruby Valley (App. D, *infra*, 17a), a treaty of "Peace and Friendship," the United States and its citizens were allowed to enter Western Shoshone lands for ranching, mining and certain other specified purposes, arts.

2,3,4, while the Western Shoshone were to continue their traditional or "roaming" lifestyle until the President established a reservation for their exclusive use, art.6. No such reservation was ever established, a fact not disputed. The Treaty further specified that the United States would compensate the Indians five thousand dollars annually over a period of twenty years for the rights conceded; the compensation would be "in such articles . . . as the President of the United States shall deem suitable for their wants and condition, either *as hunters* or herdsmen." Art. 7 (emphasis supplied).

In the proceedings below the Petitioners presented scholarly works and historical documentation to show that the parties intended and understood the Treaty to reserve Western Shoshone hunting and fishing rights as an important aspect of the terms of Peace and Friendship. See, synthesizing the documentation, Brief of Plaintiffs-Appellants to the Ninth Circuit in the proceedings below, pp.5-8, 33-40. The Petitioners' contentions about the understanding of the parties to the Treaty were not disputed.

Neither the district court nor the court of appeals, however, gave any apparent consideration to the intentions or understanding of the parties to the Treaty of Ruby Valley nor to the corresponding implications of the Treaty language. The court of appeals summarily concluded that Western Shoshone hunting and fishing rights could not survive a loss of title because "there is no treaty which *grants* the Shoshone hunting and fishing rights." (App. A, *infra*, 6a) (emphasis supplied). The court attempted to distinguish cases upholding hunting and fishing rights, namely *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809,

821-26 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1983); and *Lac Courte Oreille*, 700 F.2d at 355-58, by pointing out that the treaties involved in those cases had *express* provisions concerning hunting and fishing rights. (App. A, *infra*, 6a)

The court of appeals thus propounds a new rule of treaty interpretation which would delimit and define Indian rights only according to *express* treaty language which "grants" rights to the Indians. Treaty silence or ambiguity would be construed against the Indians. This rule contravenes well-settled law, opening the door to a doctrine that obviates examination of the intention of the parties to an Indian treaty and that casts aside moral imperatives of fairness in the construction of treaty language. The court also has run afoul of the longstanding premise that the existence of an Indian treaty right does not turn on an affirmative or express grant of rights. An Indian treaty is often "not a grant of rights to the Indians, but a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905). Thus, if pre-existing aboriginal rights are connected to the objectives of a treaty, *even if only by implication or inferred intent*, the rights are reserved and legally protected by the treaty. *Id.* Accordingly, in *United States v. Michigan*, 472 F.Supp. 192, 219-49, 257-58 (W.D. Mich. 1979), *aff'd in relevant part*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981), the court extensively examined the historical record to find that the Michigan Chippewa *impliedly* reserved by treaty their pre-existing aboriginal rights to fish on ceded portions of the Great Lakes.

The court below apparently ignored *U.S. v. Michigan*, and it was off the mark in its distinction of

Lower Brule Sioux and *Lac Courte Oreilles*. The explicitness of the treaty hunting and fishing rights involved in *Lower Brule Sioux* and *Lac Courte Oreille* was not the controlling factor for the rights' survival over the loss of co-terminous occupancy rights. Controlling were the terms, including implied terms, of the treaty hunting and fishing rights as juxtaposed against the means by which the related occupancy rights were lost.

Indeed, in *Lac Courte Oreille* the Seventh Circuit specifically disregarded express treaty language that qualified the hunting and fishing rights, and the court supplanted the language with the Indians' understanding, as evinced by the historical record, in order to find that the rights survived. 700 F.2d at 356-64. Furthermore, the court held that hunting and fishing rights were reserved under the relevant treaty even though full title was not. *Id.* at 355-58.[2] In *Lower Brule* the Eighth Circuit found that the loss of occupancy rights by virtue of federal encroachments did

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[2] In the proceedings below the State of Nevada spent much ink heralding *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335 (1945). In that case, the Court held, by a narrow majority, that the Treaty of Box Elder, 13 Stat. 663 (1863), one of the five treaties negotiated with the various bands of Shoshone, did not grant the sort of federal recognition of full title that would render its taking by the United States compensable under the jurisdictional act involved. In *dictum* the majority opinion characterized the other Shoshone treaties as similar in form to the Treaty of Box Elder. *Id.* at 342-43. Whatever weight may be attached to such *dictum* for the present purposes, *Lac Courte Oreilles*, 700 F.2d at 355-58, demonstrates that an Indian treaty may reserve usufructuary rights enforceable against state defendants, even without recognizing permanent occupancy rights, *i.e.*, full title.

not also entail a loss of the Indians' treaty hunting and fishing rights "since they could still exercise those rights." 711 F.2d at 823. The Ninth Circuit decision herein opposes decisions in other circuits. The Ninth Circuit's approach, which affirmed a denial of treaty rights on summary judgment, especially cannot be reconciled with the decisions in *Lac Courte Oreille* and *U.S. v. Michigan*, where scrupulous consideration of the historical record to discover the understanding of Indian treaty parties was the norm.

III. THE COURT OF APPEALS DISREGARDED GENERAL FEDERAL PRECLUSION DOCTRINE AND THE PLAIN LANGUAGE OF THE STATUTORY BAR OF THE INDIAN CLAIMS COMMISSION ACT, FORGING AN UNDULY ONEROUS RULE OF PRECLUSION WHERE INDIAN CLAIMS PROCEEDINGS ARE IMPLICATED.

The court of appeals held that the Western Shoshone are barred from asserting hunting and fishing rights because of the award in *Western Shoshone Identifiable Group v. United States*, Docket 326-K before the Indian Claims Commission. The preclusive or collateral effect of a Commission award is set forth in Section 22(a) of the Indian Claims Commission Act, 25 U.S.C. Sec.70u (1976 ed.). The statutory bar of the Act *never* before had been interpreted as establishing a preclusive bar greater than that generally accorded judgments. To the contrary, the U.S. Court of Claims, in construing an identical statutory provision, concluded that the provision "merely restates generally accepted principles as to the effect of judgments, and does not require stricter rules than those usually applicable." *Carpenter v. United States*, 108 F.Supp. 107, 108 (Ct. Cl. 1952). The court of appeals

in this case failed to adhere to or, apparently, even to consider such principles.

First, the court of appeals failed to assess whether the Indian Claims Commission proceedings in Docket 326-K in fact included or disposed of the subsequently asserted hunting and fishing rights. The Western Shoshone's action to enjoin contemporary infringements of treaty-reserved hunting and fishing rights by the State of Nevada is not merged with or controlled by the Indian claims proceedings. Those proceedings involved an allegation and finding that *exclusive* occupancy rights, *i.e.* "title," were extinguished by virtue of federally authorized encroachments occurring before August 13, 1946, the cut off date for claims under the Claims Act.

By 1946, a minor portion of the lands within the Western Shoshone aboriginal domain in Nevada had been patented to individuals under the federal homestead, mining and railroad grant laws. *See U.S. v. Dann*, 706 F. 2d at 927-33. The remainder of the lands had been closed to settlement and included in federal grazing districts and national forests under the federal public lands laws, or committed to other federal uses. *See id.* The United States government had not otherwise foreclosed Western Shoshone uses of their aboriginal lands.

The Indian Claims Commission found that Western Shoshone "title" to their aboriginal lands was extinguished by "gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States for its own use and benefit, or the use and benefit of its citizens." *Id.* at 416, 446-b. Under a fair construction of the Treaty of Ruby Valley, Western Shoshone hunting

and fishing rights were to survive federally authorized encroachments of the kind the Indian Claims Commission found to have extinguished full occupancy rights. Nothing in the historical record suggests that the agreement by the Western Shoshone to permit certain uses and occupancy of their lands was meant to be a wholesale giveaway of Western Shoshone rights. It has long been established that Indian hunting and fishing rights can survive in the absence of exclusive occupancy rights. Felix S. Cohen's Handbook of Federal Indian Law 442 (Renard Strickland, *et al.*, eds. 1982); *e.g.*, *Antoine v. Washington*, 420 U.S. 194, 199-204 (1975); *Lac Courte Oreilles Band of Chippewa Indians*, 700 F.2d at 362-64; *Lower Brule Sioux*, 711 F.2d at 823.

The only rationale offered by the court of appeals for linking the asserted hunting and fishing rights with the ICC proceedings is in the court's statement that the "Commission had before it a claim based on both aboriginal and treaty-based rights". (App. A, *infra*, 6a) (citing *Shoshone Nation*, 11 Ind. Cl. Comm. at 419). The court's reference to the ICC proceedings is at best misleading. The page of the ICC opinion cited only vaguely refers to the Shoshone treaties. The Commission nowhere stated or implied that among the aboriginal or treaty rights included in the claim were the *hunting and fishing* rights asserted here. Neither the petition setting forth the claim before the ICC nor the valuation of the claim specified a taking of hunting or fishing rights. *See* Petition before the ICC in Docket 326 (Exhibit A to Defendants' Supplemental Brief in Opposition to Motion for Summary Judgment, docket no. 64 of record below); *Western Shoshone Identifiable Group v. United*

States, 29 Ind. Cl. Comm. 5, 30 (1972) (valuing the "surface of the lands" for "farming, grazing and townsite" uses). Indeed, the claims attorneys represented to the Western Shoshone that the

> claims litigation would not affect one way or another the existing hunting and fishing rights of the tribe.

Letter to Mr. Clarence Blossom from Attorney Robert Barker of Jan. 13, 1960 (App. E *infra*, 23a).

Other federal circuit courts have declined to hold a judgment or award in the Indian Claims Commission to preclude a subsequent action absent a clear showing that the rights asserted in the subsequent action were a subject of the ICC claim. *See Devils Lake Sioux Tribe v. North Dakota*, 917 F.2d 1049, 1051 (8th Cir. 1990) (taking of Indian lands did not include, and hence did not preclude in a subsequent action, a claim for an adjacent lakebed, even though the petition in the ICC "may have contained an implicit reference to the lakebed"); *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1462 & n.14 (10th Cir. 1987) (action for equitable title in lands was not barred by ICC award concerning the same lands, where the equitable title action involved an infringement of rights later in time than that adjudicated in the ICC).[3]

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[3] Before this case the Ninth Circuit itself adhered to generally accepted merger rules in considering the preclusive effect of an ICC award. *See Swim v Bergland*, 696 F.2d 712, 718 (9th Cir. 1983) (ICC award for the taking of Indian lands did not preclude a subsequent assertion of Indian grazing rights over the same lands, where the ICC action was not clearly premised on the extinguishment of the grazing rights); *cf. United States v. Dann*, 873 F.2d 1189 (9th Cir. 1989) (*Dann III*), *cert. denied.*, 110 S.

The Ninth Circuit in this case bypassed rigorous merger analysis in part by adopting the premise that Western Shoshone by this lawsuit seek to "relitigate the issue of title" (App. A, *infra*, 3a), thus placing the present action squarely at odds with the Commission's finding of title extinguishment. It is far from clear how the court arrived at this characterization. In their briefs and at oral argument on the appeal, the Western Shoshone petitioners repeatedly emphasized that they were not by this action challenging the ICC's finding of title extinguishment. While Western Shoshone title clearly was the subject of the proceedings in Docket 326, the same cannot be said of the asserted hunting and fishing rights.

Secondly, in addition to ignoring principles of claim merger, the court of appeals disregarded the express terms of the statutory bar of the ICCA, under which a Commission award operates preclusively only in favor of the United States. Under section 22(a) of the Act, "payment" of a claim acts as a "full discharge *of the United States*," and a "final determination" of a claim "shall forever bar" the same claim, but only "*against the United States.*" 25 U.S.C. § 70u (1976). *Plainly and simply, this action does not involve the*

Ct. 234 (1989) (assertion of Western Shoshone aboriginal title barred by ICC award for title extinguishment); *White Mountain Apache Tribe v. Clark*, 604 F.Supp. 185, 187-89 (D. Ariz. 1984), *aff'd*, 784 F.2d 921 (9th Cir.), *cert. denied*, 479 U.S. 1006 (1986) (applying principles of *res judicata* to find action based on erroneous boundary survey to be foreclosed by earlier ICC proceedings); *Havasupai Tribe v. United States*, 752 F. Supp 1471, 1480-81 (D. Ariz 1990), *aff'd*, 943 F.2d 32 (1991) (applying preclusion doctrine to find that action for aboriginal right of access was merged with, and hence barred by, prior ICC aboriginal title claim).

United States but rather is against Nevada defendants and thus cannot be barred by the ICC proceedings. See Cayuga Indian Nation v. Cuomo, 667 F. Supp. 938, 947 & n. 12 (N.D.N.Y. 1987) (preclusive effect of ICC proceedings could not extend to state defendants under terms of statutory bar). This case is unlike *United States v. Dann*, 470 U.S. 39 (1985), which involved an assertion of aboriginal title against the United States.

The statutory bar reflects the traditional mutuality requirement of the common law doctrine of *res judicata* (claim preclusion), which holds that a final judgment on the merits precludes only a subsequent suit involving the *same* claim and the *same* parties. *See generally Triplett v. Lovell*, 297 U.S. 638, 642 (1936); 18 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4463 (1981). "Mutuality of parties remains an element" of preclusion doctrine. *Beard v. O'Neal*, 728 F.2d 894, 897 (7th Cir. 1984) (*citing Nevada v. United States*, 463 U.S. 143 (1983)); *accord Jackson v. Hayakawa*, 605 F.2d 1121, 1126 & n.6 (9th Cir. 1979); *Davis Wright & Jones v. National Union Fire Ins.*, 709 F.Supp. 196, 198-204 (W.D. Wash. 1989). Actions under the Indian Claims Commission Act were authorized against the United States only, hence the statutory rule that the preclusive effect of an award does not extend to parties other than the United States.

The court of appeals rendered inoperative the express language of the statutory bar by a conclusory reference to its own decision in *United States v. Pend Oreille Public Utility District No. 1*, 926 F.2d 1502, 1507 (9th Cir.), *cert denied*, 112 S. Ct 415 (1991). The decision in *Pend Oreille*, however, gives no apparent

consideration to the limiting language of the statutory bar or the mutuality of parties requirement, but rather simply holds the Kalispel Tribe's assertion of riverbed title against the State of Washington to be barred upon a finding that the riverbed was included in prior ICC proceedings. *Id.* at 1507-08. Such bootstrapping reliance on distinguishable authority—distinguishable in that Washington derived its title from the United States upon admission to the Union—cannot overcome clear statutory language.

Finally, in expansively interpreting the preclusive effect of the Commission award in Docket 326-K, the court of appeals overlooked the relevant equities. "Overriding considerations of fairness" are themselves an inherent part of preclusion doctrine. *Blonder-Tongue Labs. v. Univ. Foundation*, 402 U.S. 313, 325 (1971). The historical record makes clear that the ICC proceedings are far from having afforded the Western Shoshone a fair opportunity to assert their rights or a just resolution of their grievances. The Western Shoshone claim was initiated by the Temoak Band, which was only one of twenty-two Western Shoshone tribal groups, and pursued without the consent or participation of the others. Clinton, *et al.*, *supra*, at 734. And even the Temoak Band eventually objected to the proceedings when it became apparent to them that their lawyers were pursuing the claim without safeguarding continuing possessory and use rights over their ancestral lands. Ultimately, the Temoaks attempted to fire the attorneys and wrote to the Secretary of Interior:

> There are many strange things about the way these lawyers have operated. They no longer report to us but to a "claims committee" which

> was elected by just a few Indians and has no rules or any way for the people to control them. These lawyers not only have refused to protect the title to the land we still have but have fought our people who have tried to do it themselves . . .

1976 Letter from Temoak Band Chairman to Secretary of Interior, as quoted in Clinton, *et al.*, *supra*, at 735. Further, as already noted, the claims lawyers gave assurances to the Western Shoshone that the ICC claim would not affect their hunting and fishing rights "one way or another." (App. E *infra*, 23a) Since the Commission's $26 million award was certified in 1979, the Western Shoshone have resisted legislative proposals that would distribute the award without protecting Western Shoshone rights. By the same token, Congress has refrained from enacting a distribution plan.

IV. THE COURT OF APPEALS DECISION FORGES A NEW DOCTRINE OF EXTINGUISHMENT OF INDIAN RIGHTS IN CONFLICT WITH FOUNDATIONAL PRINCIPLES LONG UPHELD BY THIS COURT

As an alternative to faithfully applying preclusion doctrine, the court of appeals embarked on an alternative, but faulty, route of analysis. The court largely bypassed applying the statutory bar or preclusion doctrine and found an actual extinguishment of Western Shoshone rights on the basis of nothing other than the award in the claims proceedings. Thus the Ninth Circuit went far beyond *United States v. Dann*, 470 U.S. 39, in which this Court simply held that "payment" occurred in Docket 326-k with the effect of setting in motion the statutory bar. The Ninth Circuit's interpretation of the effect of the Commission

award cannot be reconciled with a line of federal court decisions, including prior decisions by the Ninth Circuit, that the Commission was without power actually to extinguish rights. *Devil's Lake Sioux Tribe v. North Dakota*, 917 F.2d 1049, 1051 (1990); *United States v. Dann*, 706 F.2d at 928. The Commission could neither grant nor extinguish Indian rights to the occupancy and use of Indian ancestral lands. The Commission was established to provide monetary compensation for historic wrongs committed against Indians, not to create new wrongs by extinguishing existing Indian legal claims and rights. *Id*; *see* 25 U.S.C. 70a (1976 ed.). The Ninth Circuit's newly propounded rule of extinguishment, moreover, is contrary to the long established doctrine that Indian rights are extinguished only by clear and unambiguous congressional directive or authorization. *See United States ex. rel. Hualpai Indians v. Santa Fe Pacific Railroad*, 314 U.S. 339, 347 (1941); Cohen's Handbook of Federal Indian Law 443 (1982 ed.).

Even assuming that a Commission award could itself somehow result in the actual extinguishment of rights, in addition to establishing a preclusive bar, the scope of the extinguishment would have to be measured by the Commission's findings. The court of appeals exaggerates the character of the extinguishment held to have occurred in ICC Docket 326-K. The court inferred from the ICC proceedings a "general," "unqualified" or "unconditional transfer of title." (App. A, *infra*, 5a-7a). In fact the Commission found that Western Shoshone title was extinguished by historical "gradual encroachment" by whites and the "disposition or taking of their lands by the United States" over a period of time. *Shoshone Nation*, 11

Ind. C. Comm. at 412. Whether hunting and fishing rights survive a presumed extinguishment of title must be determined by reference to the historical acts relied upon, and not by reference to imagined acts with no grounding in the Commission record or actual historical events.

The court of appeals was mistaken in its reliance on *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985). Indeed, its reasoning is in sharp conflict with *Klamath*. By the 1901 cession agreement the Klamath gave up all "right, title and interest" to lands. This Court examined the surrounding circumstances, including a prior treaty, to find that both Congress and the Indians understood the cession agreement to include a cession of hunting and fishing rights. *Klamath*, 473 U.S. at 766-74. There is no similar instrument of extinguishment or conveyance with regard to the Western Shoshone. Rather the Commission in Docket 326-K relied on pre-1946 "gradual encroachment" by whites and federal action not specifically aimed at taking Indian rights. If *Klamath* were correctly applied, the inevitable conclusion would be that such encroachment and federal action, although having foreclosed occupancy and certain use rights over Western Shoshone lands, do not likewise operate to foreclose the exercise of hunting and fishing rights. As already stressed, the Treaty of Ruby Valley reserved usufructuary rights not dependent upon exclusive occupancy.

The Ninth Circuit likened the Commission's finding of title extinguishment in Docket 326-K to the 1901 Klamath cession agreement, which the Supreme Court held to include a cession of hunting and fishing rights.

(App. A *infra*, 5a-6a) The analogy fails firstly because the Commission could not itself legally effect an extinguishment of rights, whereas the Klamath cession agreement was unquestionably a legal conveyance of rights. Secondly, even if extinguishment of rights is presumed to result from the ICC proceedings, the relevant comparison is between the Klamath cession agreement and the grounds upon which the Commission in Docket 326-K based its finding of extinguishment, not the finding itself as transformed into an "unconditional transfer of title." And here again the comparison fails. Gradual encroachment, under the Treaty of Ruby Valley, did not do away with Western Shoshone hunting and fishing rights.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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May, 1992

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90-16175

DC No. CV-86-0057-BRT

OPINION

WESTERN SHOSHONE NATIONAL COUNCIL; ROLAND BRADY; IAN ZABARTE; GLENN HOLLEY; FELIX IKE,
PLAINTIFFS-APPELLANTS

v.

WILLIAM MOLINI, DIRECTOR, NEVADA DEPARTMENT OF WILDLIFE; TERRY CRAWFORTH, DIRECTOR OF LAW ENFORCEMENT, NEVADA DEPARTMENT OF WILDLIFE,
DEFENDANTS-APPELLEES

Appeal from the United States District Court for the District of Nevada

Honorable Bruce R. Thompson, District Judge, Presiding

Argued and Submitted June 26, 1991 - Reno, Nevada

Filed December 9, 1991

Before: J. Clifford Wallace, Chief Judge, Charles Wiggins and Melvin Brunetti, Circuit Judges.

WALLACE, Chief Judge:

The Western Shoshone National Council and individual Western Shoshone (Shoshone) appeal from the district court's summary judgment in favor of the State of Nevada Department of Wildlife (Nevada), in their action to enjoin certain wildlife laws and regulations. The Shoshone argue that the district court erred by holding that an award by the Indian Claims Commission (Commission) conclusively established that Shoshone aboriginal and treaty-reserved rights to hunt and fish had been extinguished. The district court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1362 and 2201. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm.

I.

The Indian Claims Commission Act (Act) was designed to provide a forum for Indian claims arising from the United States taking of the Indian lands. 25 U.W.C. § 70 (1976 ed.). The Act created the Commission, which was empowered to hear and decide land claims brought against the United States. *Id.* § 70a. The Act also provided that "payment of any claim . . . shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." *Id.* § 70u.

In 1951, the Temoak Band of Indians filed suit under the Act on behalf of the Western Shoshone, stating a claim based on extinguishment of tribal rights to lands in Nevada and other states. *Shoshone Nation or Tribe of Indians v. United States*, 11 Ind. Cl. Comm. 387, 419 (1962) (*Shoshone Nation*). After hearing all the evidence, the Commission concluded that the Shoshone title had been extinguished, "by gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States . . . ." *Id.* at 416. The Commission later valued the land taken and ordered the United States to pay $26 million to the Shoshone in compensation for "full title extinguishment." *Temoak Band of Western Shoshone*

Indians v. United States, 219 Ct. Cl. 346, 356 (Temoak Band), *cert. denied*, 444 U.S. 973 (1979).

In 1986, the Shoshone brought this action against the State of Nevada, arguing that Nevada's wildlife regulations interfered with Shoshone aboriginal and treaty reserved rights to hunt and fish. In defense, Nevada relied on the *Shoshone Nation* litigation, and argued that the Shoshone no longer held any title to the land in question. The district court agreed, and entered summary judgment in favor of the State. We review this ruling de novo. *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990).

II.

The Shoshone argue that the summary judgment must be reversed for three reasons. First, they contend that the Commission award has no preclusive effect in their lawsuit against the State of Nevada. Second, they argue that hunting and fishing rights are not affected by the title determination in *Shoshone Nation*. Finally, they assert that the Treaty of Ruby Valley operates as an independent source of hunting and fishing rights, and that those rights survive the *Shoshone Nation* litigation. We address each of these contentions.

A.

The Shoshone first argue that the *Shoshone Nation* litigation only involved an adjudication of rights between the United States and the Shoshone Indians, and that this litigation does not operate to bar their action against the State of Nevada. In support of this argument, they point out that the statutory bar of 25 U.S.C. § 70u only applies to actions against the United States. They therefore contend that although they have been paid $26 million for loss of title, they are nonetheless entitled to relitigate the issue of title against the State of Nevada.

The Shoshone's argument has already been rejected in this circuit. In *United States v. Dann,* 873 F.2d 1189 (9th Cir. 1989) (Dann), *cert. denied,* 110 S. Ct. 234 (1989), two Shoshone Indians asserted tribal title as a defense to a trespass claim. In rejecting this defense, we stated that "the [Commission proceeding and subsequent] payment for the taking of a [sic] aboriginal title establishes that the title has been extinguished." *Id.* at 1194; *see also id.* at 1199 ("the payment of the claims award established conclusively that a taking occurred"). We did not suggest that the Commission's determination of title applied only in actions against the United States. See *id.*

In *United States v. Pend Orielle Public Utility District No. 1,* 926 F.2d 1502, 1507 (9th Cir. 1991), we followed Dann by holding that a Commission award barred the Kalispo Indian Tribe from asserting title against the State of Washington. There, we reasoned that "[t]he chief purpose of the Act [establishing the Commission] was to dispose of the Indian claims problem with finality" and that consistent with this purpose, compensation for a taking established that Indian title had been extinguished. *Id.* at 1508 (internal quotations and citations omitted). We therefore found that the Commission award barred the Tribe from relitigating the issue of title in a subsequent proceeding against the State of Washington. *Id.*

Dann and *Pend Orielle* are controlling. We hold that the award in *Shoshone Nation* constituted a general determination of title which bars the Shoshone from asserting title against the State of Nevada.

B.

The Shoshone also argue that their aboriginal and treaty reserved hunting and fishing rights survive the extinguishment of title. They contend that "[t]he claim [before the Commission] was for compensation for the presumed taking of aboriginal title, whereas this case is for injunctive

relief against the interference with hunting and fishing rights that exist independently of aboriginal title." Thus, the Shoshone draw a distinction between title and hunting and fishing rights and argue that a taking of the former does not entail a taking of the latter.

The Supreme Court has held that the conveyance of title includes hunting and fishing rights, absent an express reservation of those rights. In *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985) (*Oregon Department of Fish*), the Court construed a 1901 agreement between the Klamath Tribe and the United States giving up certain lands that had formerly been part of the Tribe's reservation. Under the agreement, the Klamath Tribe consented to "cede, surrender, grant, and convey to the United States all their claim, right, title and interest" in the reservation lands. *Id.* at 760. However, the agreement also provided that it would not be "construed to deprive [the Klamath Tribe] of any benefits to which they are entitled under existing treaties not inconsistent with the provisions of this agreement." *Id.* at 761.

Relying on this language, the Klamath Tribe argued that the agreement did not deprive them of their hunting and fishing rights on the ceded lands. *Id.* at 762-63. The Supreme Court rejected this argument. The Court pointed out that the treaty language had included an unrestricted grant of land to the United States. The Court concluded that the "general conveyance unquestionably carried with it whatever special hunting and fishing rights the Indians had previously possessed [in the land]." *Id.* at 766.

The Shoshone argue that *Oregon Department of Fish* should be limited to cases involving treaties, and does not have any relevance to our interpretation of the Commission's findings. But how can this be so? Both cases involve a general transfer of title. *See Temoak Band*, 219 Ct. Cl. at 356 (compensation for "full title extinguishment"); *Oregon Department of Fish*, 473 U.S. at 766 ("general con-

veyance" of title). This unqualified transfer of title includes a transfer of hunting and fishing rights. *Oregon Department of Fish,* 473 U.S. at 766; *accord In Re Wilson,* 30 Cal. 3d 21, 177 Cal. Rptr. 336, 634 P.2d 363 (1981) (rejecting Indian's claim that extinguishment of aboriginal title does not extinguish hunting and fishing rights, after surveying case law and concluding that "the right to hunt and fish has been held included in the right of occupancy").

The Shoshone also urge us to follow a number of cases in which courts have held that treaty based rights cannot be extinguished absent an express termination of those rights. *See Lower Brule Sioux Tribe v. South Dakota,* 711 F.2d 809, 821-26 (8th Cir. 1983) (right to hunt and fish expressly granted by treaty will not be abrogated absent express and unambiguous statement by Congress), *cert. denied,* 464 U.S. 1042 (1984). *Lac Courte Oreilles Band of Chippewa Indians v. Voigt,* 700 F.2d 341, 355-58 (7th Cir.) (abrogation of explicit treaty right to hunt and fish should not be found without compelling evidence), *cert. denied,* 464 U.S. 805 (1983). However, these cases are inapplicable here, because there is no treaty which grants the Shoshone hunting and fishing rights. We therefore hold that Shoshone aboriginal hunting and fishing rights were taken when "full title extinguishment occurred."

C.

The Shoshone finally argue that the Treaty of Ruby Valley operates as an independent source of hunting and fishing rights. They assert that the Commission award, while extinguishing aboriginal title, could not affect their independent treaty-based rights. This argument ignores the fact that the Commission had before it a claim based on both aboriginal and treaty-based rights, and ordered compensation for the extinguishment of those rights. *See Shoshone Nation,* 11 Ind. Cl. Comm. at 419. The Commission's general finding that title had been extinguished therefore also operates to bar the Shoshone from asserting

hunting and fishing rights based on the Treaty of Ruby Valley. *See Oregon Department of Fish,* 473 U.S. at 773.

D.

We conclude that the Commission award establishes conclusively that Shoshone title has been extinguished. We further hold that absent some express reservation, hunting and fishing rights are subsumed within an unconditional transfer of title. We therefore affirm the district court's summary judgment in favor of Nevada in the Shoshone action to enjoin the Nevada fishing and hunting regulations.

III.

The Shoshone also appeal from the district court's denial of their motion to amend the complaint to include a claim for individual, as opposed to tribal, title. The Shoshone filed their original petition in this case in December of 1986. They then twice amended their complaint, and filed a motion for summary judgment in October of 1987. The district court delayed action on the motion pending this circuit's ruling in *Dann.* After *Dann* was decided, the State of Nevada filed a cross-motion for summary judgment. In response, the Shoshone moved for permission to amend the complaint. The district judge implicitly denied leave to amend when he granted the government's motion for summary judgment. *See Agostino v. Ellamar Packing Co.,* 191 F.2d 576, 577 (9th Cir. 1951) (denial of a motion is implied by an order inconsistent with the motion).

We review denial of a motion to amend for abuse of discretion. *Ascon Properties, Inc. v. Mobil Oil Co.,* 866 F.2d 1149, 1160 (9th Cir. 1989). Where the district judge offers no express reasons for dismissing a compliant without leave to amend, we should evaluate the propriety of the appellant's motion by looking at five factors: "(1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility

of amendment; and (5) whether plaintiff has previously amended its complaint." *Id.*

Several of these factors support the district judge's denial of the leave to amend. The second factor is implicated because the motion to amend the complaint was filed two and a half years after the litigation commenced, and there appears to be no justification for the delay. The issue of individual aboriginal title was raised in the *Dann* litigation as early as 1985, *see United States v. Dann*, 470 U.S. 39, 50 (1985), and the basis for such claims is the 1923 opinion in *Cramer v. United States*, 261 U.S. 219 (1923). Therefore, the Shoshone could have raised this issue much earlier in the litigation by relying on these relevant cases.

Turning to the third factor, there is evidence that the amendment would prejudice the State of Nevada. In Ascon, we found prejudice because "the time and expense of continued litigation on a new theory, with the possibility of additional discovery, would cause undue prejudice." 866 F.2d at 1161 (internal quotations omitted); *see also M/VAmerican Queen v. San Diego Marine Construction Corp.*, 708 F.2d 1483, 1492 (9th Cir. 1983) (denial of motion to amend upheld where new allegations based on facts moving party already knew would totally alter basis of action and necessitate additional discovery). Similarly here, the introduction of a major new evidentiary issue at such a late stage in the litigation will require extensive additional discovery. In addition, Nevada has been subjected to an injunction during the entire course of the litigation. The lapse of time caused by additional discovery, briefing, and argument, will further prejudice Nevada, because Nevada's fish and game law will continue to be held in abeyance by the district court's injunction while this litigation continues.

Finally, factor five is involved because the Shoshone have already amended their complaint two times.

In light of the circumstances of the case, the district judge's denial of leave to file a third amended complaint was not an abuse of discretion.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

DC No. CV-N-86-587 BRT

WESTERN SHOSHONE NATIONAL COUNCIL; et al.,
PLAINTIFF

v.

WILLIAM MOLINI, Director, Nevada Department of Wildlife; et al.,
DEFENDANTS

[Filed July 19, 1990]

SUMMARY JUDGMENT

In this action plaintiffs, the Western Shoshone National Council and certain individual Shoshone Indians, seek to establish unrestricted hunting and fishing rights in the area described in the Treaty of Ruby Valley. Defendants, state officials charged with enforcement of Nevada hunting and fishing regulations, oppose the action asserting plaintiffs' subjugation to appropriate state control on the same basis as all other persons.

Since the action was commenced, the defendants have by agreement been restrained from enforcing state fish and game regulations against plaintiffs. The terms and conditions of this agreement have no effect on the final disposition of this case. The need for prompt ill-considered action was avoided by the agreement.

The Treaty of Ruby Valley (1869), a treaty of peace and friendship between the United States and the Western Bands of Shoshone Indians, provided that all hostilities against emigrant trains and citizens of the United States should cease. It also recognized the rights of emigrants to mine and settle on Shoshone lands. Article VII deals specifically with hunting, in the following language:

> The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceding stipulations, and of their faithful observance of the said bands, the United States promise and agree to pay to the said bands of the Shoshonee nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen. And the said bands hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded. There is no contention that the United States has not complied with Article VII.

Final decision in this case was delayed pending final decision in *U.S. v. Mary Dann and Carrie Dann,* ___ , F.2d (9th Cir. 1989), which was then pending on appeal. The parties to this action have cited almost every decided case dealing with Indian aboriginal rights touching on the rights to hunt andfish. After study of the authorities and the arguments flowing therefrom we think decision in this case is governed by two controlling precedents.

The *Dann* decision, preceded by a tortuous path of litigation ultimately concluded that the aboriginal title of the Shoshone Indians had been extinguished by payment of the judgment of the Indian Claims Commission. "When tribal title has been extinguished and paid for pursuant to the Indian Claims Commission Act, we cannot view the remnants of that tribal title as surviving thereafter in individual tribal members." *Dann* also identified July 1, 1872 as the date when tribal title was extinguished.

The other precedent of great import for this case is *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe,* 473 U.S. 753, 105 S. Ct. 3420 (1985). The 1864 Treaty with the Klamath Indians ceded 22 million acres to the United States and excepted 1.9 million acres for an Indian reservation, securing to the Indians the exclusive right of "taking fish" within the reservation. No right to hunt within the reservation and no right to hunt and fish outside the reservation was expressly preserved by the Treaty.

After the reservation boundaries were surveyed, the Klamath Indians promptly protested that thousands of acres described in the Treaty had been excluded from the reservation. A Klamath Boundary Commission was appointed and its report, after investigation, concluded that 617,000 acres had been erroneously excluded from the reservation. The Commission valued the excluded land at 88.36 cents per acre, basing the valuation on its use for timber and stock grazing. The report did not discuss hunting or fishing activities or give a value to the right to conduct such activities on the land. The final cession agreement in June 1901 cedes 621,824 acres to the United States for $537,007.20. Members of the tribe continued to hunt and fish on the ceded lands after 1901, and there is no record of the state of Oregon asserting fish and game regulatory jurisdiction over the ceded lands until this action was commenced. Subsequently a claim was filed with the Indian Claims Commission and the Commission, in

1969, granted the Klamath Indians $4,162,992.80 additional compensation for the lands ceded by the 1901 agreement. The award, which was paid, was based on the estimated value of the land for stock grazing and timber harvesting and did not mention or give a value to hunting and fishing rights.

The United States Supreme Court reversed the decisions of the United States District Court for the District of Oregon and the United States Court of Appeals for the Ninth Circuit, and held that the Klamath Indians had no aboriginal retained rights to hunt and fish on the 621,824 acres of ceded lands and that this territory was within the regulatory authority of the state of Oregon. Noting that the 1864 Treaty referred only to fishing rights, the court observed: "Although hunting is not expressly mentioned in the Treaty, it is clear that any exclusive right to hunt was also confined to the reservation." 473 U.S. 767. This construction is pertinent to the interpretation of Section VII of the Treaty of Ruby Valley which refers only to compensation for "game" and not for fish.

In the *Klamath* case, the Supreme Court relied upon the language of the 1901 Agreement as a conveyance of the Tribe's title to the land and a surrender of "all their claims, right, title, and interest in and to" that portion of the reservation, (473 U.S. 768) despite the fact that hunting and fishing rights may be enjoyed by Indians independent of any ownership of land (*Antoine v. Washington*, 420 U.S. 194, 95 S. Ct. 944) and that hunting and fishing rights were not expressly surrendered, and concluded that the Klamath Indians retained no hunting and fishing rights free from state regulation on the ceded territory.

Alluding to the Claims Commission award, the Supreme Court said (420 U.S. 774):

> Moreover, the Tribe has since been afforded an opportunity to recover additional compensation for the ceded lands, in light of the 'uncon-

> scionable' amount paid in 1906. 20 Ind. Cl. Comm'n, at 530. Yet in that proceeding, which resulted in an award to the Tribe of over $4 million, id., at 543, the Tribe apparently agreed that the 'highest and best uses' for the ceded lands were commercial lumbering and livestock grazing, again without mention of any hunting or fishing rights. The absence of specific compensation for the rights at issue is entirely consistent with our interpretation of the 1901 Agreement.
>
> VII
>
> Thus, even though 'legal ambiguities are resolved to the benefit of the Indians,' DeCoteau v. District County Court, 420 U.S. 425, 447 S.Ct. 1082, 1094, 43 L.Ed.2d 300 (1975), courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' Washington v. Washington Commercial Passenger Fishing Vessel Assn., 443 U.S., at 675, 99 S.Ct., at 3069, clearly runs counter to a tribe's later claims. Careful examination of the entire record in this case leaves us with the firm conviction that the exclusive right to hunt, fish, and gather roots, berries, and seeds on the lands reserved to the Klamath Tribe by the 1864 Treaty was not intended to survive as a special right to be free of state regulation in the ceded lands that were outside the reservation after the 1901 Agreement. The judgment of the Court of Appeals is therefore reversed.

In the present case, plaintiffs have lost aboriginal title to the territory in question by virtue of the paid award of the Indian Claims Commission which had a statutory effect (Section 22a of the Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 1055 (1946)): "The payment of any claim . . . shall be full discharge of the United States of

all claims and demands touching any of the matters involved in the controversy."

The foregoing is comparable to the right, title, and interest language in the *Klamath* case and carries a like implication of surrender of usufructuary rights to hunt and fish.

Also, unlike the Klamath Treaty, the Treaty of Ruby Valley was specifically concerned with such usufructuary rights in the area of use by the Shoshone Tribes and in Article VII provided for the loss of such rights, as the encroachments of the white settlers destroyed their value.

Finally, irrespective of aboriginal retained rights, strong authority recognizes a state's rights to manage hunting and fishing on public lands by non-discriminatory regulation. *Payallup Tribe v. Department of Game of Washington*, 391 U.S. 392, 88 S. Ct. 1728 (1968); *Kennedy v. Becker*, 241 U.S. 556, 36 S. Ct. 7095 (1916); *United States v. Winans*, 198 U.S. 371 (1905); *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 99 S. Ct. 3055 (1979).

In consideration of the premises,

IT HEREBY IS ORDERED, ADJUDGED AND DECREED that:

1. The temporary injunction heretofore entered is vacated and plaintiffs' motion for a permanent injunction is denied.

2. Plaintiffs' motion for summary judgment is denied and summary judgment is hereby granted to defendants with the force and effect that the action entitled above is hereby dismissed with prejudice.

DATED July 10, 1990.

/s/ BRUCE R. THOMPSON
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90-16175
DC No. CV-86-00587-BRT

WESTERN SHOSHONE NATIONAL COUNCIL; ROLAND BRADY; IAN ZABARTE; GLENN HOLLEY; FELIX IKE,
PLAINTIFFS-APPELLANTS

v.

WILLIAM MOLINI, DIRECTOR, NEVADA DEPARTMENT OF WILDLIFE; TERRY CRAWFORTH, DIRECTOR OF LAW ENFORCEMENT, NEVADA DEPARTMENT OF WILDLIFE,
DEFENDANTS-APPELLEES

Appeal from the United States District Court for the District of Nevada

ORDER DENYING REHEARING

[Filed March 2, 1992]

Before: WALLACE, Chief Judge, WIGGINS and BRUNETTI, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX D

TREATY WITH THE WESTERN SHOSHONEE

Treaty between the United States of America and the Western Bands of Shoshonee Indians. Concluded October 1, 1863; Ratification advised, with amendment, June 26, 1866; Amendment assented to June 17, 1869; Proclaimed October 21, 1869.

ULYSSES S. GRANT, PRESIDENT OF THE UNITED STATES OF AMERICA

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

Whereas a Treaty was made and included at Ruby Valley, in the Territory of Nevada, on the First day of October, in the year of our Lord one thousand eight hundred and sixty-three, by and between James W. Nye and James Duane Doty, Commissioners, on the part of the United States, and Te-moak, Mo-ho-a, Kirk-weedgwa, To-nag, and other Chiefs, Principal Men, and Warriors of the Western Bands of the Shoshonee National of Indians, on the part of said bands of Indians, and duly authorized thereto by them, which Treaty is in the words and figures following, to wit:

Treaty of Peace and Friendship made at Ruby Valley, in the Territory of Nevada, this first day of October, A.D. one thousand eight hundred and sixty-three, between the United States of American, represented by the undersigned commissioners, and the Western Bands of the Shoshonee Nation of Indians, represented by their Chiefs and Principal Men and Warriors, as follows:

ARTICLE 1.

Peace and friendship shall be hereafter established and maintained between the Western Bands of the Shoshonee

nation and the people and Government of the United States; and the said bands stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States within their country, shall cease.

ARTICLE 2.

The several routes of travel through the Shoshonee country, now or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States, and of all emigrants and travellers under its authority and protection, without molestation or injury from them. And if depredations are at any time committed by bad men of their nation, the offenders shall be immediately taken and delivered up to the proper officers of the United States, to be punished as their offences shall deserve; and the safety of all travellers passing peaceably over either of said routes is hereby guarantied by said bands.

Military posts may be established by the President of the United States along said routes or elsewhere in their country; and station houses may be erected and occupied at such points as may be necessary for the comfort and convenience of travellers or for mail or telegraph companies.

ARTICLE 3.

The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through a part of the Shoshonee country, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said bands, and that their property and the lives and property of passengers in the stages and of the employes of the respective companies, shall be protected by them. And further, it being understood that provision has

been made by the government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by the said bands that the said railway or its branches may be located, constructed, and operated, and without molestation from them, through any portion of country claimed or occupied by them.

ARTICLE 4.

It is further agreed by the parties hereto, that the Shoshonee country may be explored and prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be required. Mills may be erected and timber taken for their use, as also for building and other purposes in any part of the country claimed by said bands.

ARTICLE 5.

It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:

On the north by Wong-goga-da Mountains and Shoshonee River Valley; on the west by Su-non-to-yah Mountains or Smith Creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley.

ARTICLE 6.

The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which, they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reser-

vations as he may indicate, and to reside and remain therein.

ARTICLE 7.

The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceding, stipulations, and of their faithful observance of the said bands, the United States promise and agree to pay to the said bands of the Shoshonee nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen. And the said bands hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded.

ARTICLE 8.

The said bands hereby acknowledge that they have received from said commissioners provisions and clothing amounting to five thousand dollars as presents at the conclusion of this treaty.

Done at Ruby Valley the day and year above written.

John W. Nye
James Duane Doty.

Te-moak, his x mark.
Mo-ho-a.
Kirk-weedgwa, his x mark.
To-nag, his x mark.
To-so-wee-so-op, his x mark.
Po-on-go-sah, his x mark.
Par-a-woat-ze, his x mark.
Ga-ha-dier, his x mark.
Ko-ro-kout-ze, his x mark.
Pon-ge-mah, his x mark.

Sow-er-e-gah, his x mark. Buck, his x mark.

Witnesses:

J. B. Moore, lieutenant-colonel Third Infantry California Volunteers.
Jacob T. Lockhart, Indian agent Nevada Territory.
Henry Butterfield, interpreter.

APPENDIX E

January 13, 1960

Mr. Clarence Blossom

Battle Mountain,

Nevada

Re: Western Shoshone Litigation

Dear Mr. Blossom:

I have your letter of October 4, 1959, received in this office on January 11, 1960, in which you state that due to deceptive methods used in the Agency called meeting for Western Shoshone Tribe in Elko, Nevada, on August 21, 1959, and unfair and undemocratic procedure and high pressure method employed by Agency and attorneys on Indians of this tribe, you request your name be stricken from the renewal and amendment to the contract as signed by yourself and others at Elko, Nevada on August 21, 1959. You also state that you consider the contract void and nullified.

First, let me state that you as well as I know that there was no fraudulent or deceptive means used on the Indians, whatsoever. All persons concerned spent a full day prepared and willing to answer any question and furnish all information pertinent to the subject of the meetings at Elko. The Indians were fully informed on the action they were taking.

As you will recall, the only contention at these meetings was that some of the Indians felt that they should receive land instead of money judgment for their claim. It has been repeatedly explained to this effect over a number of years that the Indian Claims Commission Act does not give jurisdiction for the restoration of land or property,

but confines its remedy to a money judgment. Also discussed were certain problems concerning hunting and fishing rights. It was fully and honestly explained that the claims litigation would not affect one way or another the existing hunting and fishing rights of the tribe.

As you perhaps know, the Commissioner of Indian Affairs has already conditionally approved the attorney's contract. Also, you were acting as an authorized delegate of the meeting, and not individually on your own behalf. Under these circumstances, and in other cases, the Commissioner of Indian Affairs has heretofore refused to allow a delegate to withdraw his signature from a contract absent direction by a meeting similarly assembled and similarly authorized for the purpose.

We consider the contract valid and subsisting, and will continue to render services to the Western Shoshone Indians in accordance with the contract.

Very truly yours,

Wilkinson, Cragun & Barker

s/Robert W. Barker

RWB:bbs

cc: Commissioner of Indian Affairs
Superintendent, Nevada Agency